IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 19, 2006

STATE OF TENNESSEE v. LEON MCKISSACK, JR.

Appeal from the Circuit Court for Williamson County
No. II-8422 R.E. Lee Davies, Judge

No. M2005-01131-CCA-R3-CD - Filed September 7, 2006

The defendant, Leon McKissack, Jr., appeals from his four convictions for delivery of one-half gram or more of cocaine, a Class B felony, which he received in a bench trial in the Williamson County Circuit Court. The defendant was sentenced to fifteen years for each conviction, and the court ordered these sentences to be served concurrently to each other but consecutively to an unexpired sentence for which he had been paroled at the time of the offenses. The defendant challenges the sufficiency of the convicting evidence for each of his four convictions, the sufficiency of the state's proof of chain of custody of the drugs, his classification as a Range II offender, and the length of the individual sentences imposed. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which ALAN E. GLENN, J., and J.S. DANIEL, SR. J., joined.

John H. Henderson, District Public Defender, for the appellant, Leon McKissack, Jr.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Christopher K. Vernon, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the defendant's trial, the state presented evidence that on four occasions in 2003, the defendant delivered cocaine to Sylvester Island, a paid informant for the Twenty-First Judicial District Drug Task Force. The state's evidence of the four transactions is summarized below.

February 25, 2003

Island testified that on February 25, 2003, he picked up the defendant at the defendant's home. The defendant had Island take him to "Hair City," where the defendant made a phone call.

The defendant got into Island's car and told him to return to the defendant's home. Island did so, and the defendant asked for money to pay for the drugs. After the defendant agreed to leave his wallet with Island as security that he would return, Island gave him $100. The defendant went to a red or maroon Suburban and exchanged the money for drugs, and the defendant brought the drugs back to Island. The defendant wanted one of the rocks of cocaine for his involvement in the deal, and because Island was concerned that the defendant would be suspicious if he did not agree to this, Island allowed the defendant to take one of the rocks.

Deputy Rick Campbell of the Williamson County Sheriff's Department testified that as part of his duties with the Drug Task Force, he worked with Island. Campbell and other officers met with Island on February 25, searched him and his car, set up audio and video transmitting and recording devices, and gave him $100. Campbell listened to the audio transmission of the transaction, and after it was over, Island returned to a meeting place. The officers searched Island and his car. Island gave Campbell the cocaine he had purchased from the defendant, and Campbell bagged it, marked it, and placed it in a secure evidence locker.

Agent Bailey Greenewalt, the assistant director of the Drug Task Force, testified that she searched Island's car before this deal.

February 26, 2003

Island testified that on February 26, 2003, a transaction similar to the February 25 transaction took place, and after it was over, the defendant left his wallet in Island's car. Island took the wallet to Officer Chris Mobley, who looked at its contents. Island then returned the wallet to the defendant.

Agent Mobley testified that he met with Island along with Agents Kimble, Campbell, and Dougherty. Mobley gave Island $100 to make a drug purchase from the defendant. Mobley also searched Island's car. He said Campbell searched Island and wired him with a transmitter and recorder. Mobley monitored transmissions from the receiver. He heard the defendant get into Island's car, make a phone call on Island's cell phone in which the defendant said "he was a yard," which he said was a term meaning $100 of something. He heard the defendant say his source was not comfortable meeting new people and that Island should wait down the road. Mobley recounted that after waiting for some time, Island returned to the defendant's house. Mobley heard the defendant tell Island that it would be only a few more minutes. The defendant used Island's cell phone to make another call, and he had Island take him to Hair City. The defendant told Island that his source was coming to Hair City to meet him and that Island should go home. Mobley testified that Island went home and that eventually the defendant arrived on foot with crack cocaine. When Island returned to meet the officers, he had the defendant's wallet in his car, which he gave to Agent Mobley. He testified that he looked inside the wallet and saw a state identification card with the defendant's photograph, name, and birth date on it. Mobley also received a package of crack cocaine from Island. He testified that Deputy Campbell searched Island's vehicle, and he assumed that he had searched Island, as well, but he had not documented who performed that task. Mobley bagged

the cocaine, signed the seal, and placed it in the Drug Task Force's evidence locker. He testified that Deputy Campbell signed the seal, as well.

March 6, 2003

Island testified that on March 6, 2003, he took the defendant to Hair City twice to make telephone calls, after which the defendant went inside his house until an individual came to the house, and then the defendant came outside and gave Island the drugs.

Deputy Campbell testified that he met with Island and gave him $100 to purchase drugs from the defendant. Campbell recalled that Agent Mobley searched Island and his car and wired him with an audio recorder and transmitter. Campbell listened to the transaction take place via the transmitting device. After the transaction, Island returned to a meeting place, where Campbell searched him and Greenewalt searched his car. Island gave Campbell crack cocaine, which Campbell bagged, marked, and stored in an evidence locker.

June 11, 2003

Island testified that he was supposed to purchase cocaine and a handgun from the defendant's son, LaCorey Petway, on June 11, 2003, but that when he went to the housing project where he, the defendant, and Petway lived, the sheriff was there looking for Petway. The defendant and Island discussed that Island was supposed to buy a gun and drugs from Petway. The defendant went to Petway's home and got the drugs and gun and brought them back to Island, who paid him the price to which Petway had previously agreed.

Agent Mobley testified that Island told her that LaCorey Petway, who is also known as LaCorey McKissack, wanted to sell a gun and some drugs. Mobley spoke with Petway by phone on the morning of June 11 and agreed to pay $100 for cocaine and $50 for the gun. They arranged for Island to make the exchange with Petway later that day. Mobley testified that he and Agent Greenewalt met with Island and gave him $150. Mobley searched Island and wired him with a transmitter and recorder, and Greenewalt searched Island's car. Mobley did not monitor the conversations which took place in the transaction. When Island returned, he gave her the cocaine in a plastic bag and a revolver wrapped in a dishtowel. Mobley bagged these items, marked them, and stored them in an evidence locker.

Agent Greenewalt testified that the June 11 deal was supposed to be with LaCorey Petway but ended up taking place with the defendant. She summarized what she had heard on an audio transmission, which had been recorded and was played for the court. She testified that Island met with the defendant and that the defendant "agreed to go and get the cocaine and the gun." She assumed that he went to get these items from Petway. When Island returned to meet with the officers, he had crack cocaine and a gun. She searched Island's car before and after the deal.

Agent Joseph Kimble, the director of the Drug Task Force, testified that he had taken the cocaine and the gun from the June 11 deal to the TBI laboratory on July 15. He did not know why the TBI report said that the evidence was received on October 1.

Tennessee Bureau of Investigation Special Agent Mark Dunlap testified as an expert witness in forensic drug testing. He tested the evidence submitted for this transaction. It was one-half gram of cocaine. He also testified that the weight is measured to two decimal places but that the second number is truncated, making it possible the sample weighed more than one-half gram. Dunlap testified that the evidence relative to this transaction was received at the TBI laboratory on October 1, 2003.

Evidence Pertinent to More Than One Transaction

The parties stipulated at the beginning of trial that each of the substances submitted for February 25, February 26, and March 6 was cocaine and that each weighed more than one-half gram.

Agent Kimble testified that he was the only person with keys to the evidence room and evidence lockers. When other agents received evidence, they gave it to him directly or placed it in an evidence locker, which he later opened and took any contents into the evidence room. He periodically transported evidence from the evidence room to the TBI for testing, and he picked up processed evidence from the TBI and returned it to the evidence room. He was the only custodian of evidence for the Drug Task Force.

The state introduced a certified copy of a prior judgment against the defendant for possession of marijuana in a penal facility, a Class C felony. The state offered this judgment to show that the defendant had a prior felony conviction as required for a count of the indictment which charged him with being a felon in possession of a firearm.

The defendant testified on his own behalf. He admitted that he had prior convictions for forgery less than $100, third degree criminal sexual conduct, robbery, and possession of a controlled substance while incarcerated. He said that he and Island had become friends at the housing project where Island was living and where the defendant visited his five children. The defendant testified that he had assisted Island in obtaining drugs by arranging to get the drugs and then completing the transaction with money Island gave him, but he did not think he was guilty of delivery of drugs. He said that he was not a drug dealer and was only trying to help Island because Island was unemployed and had a small child. He said that Island claimed he was selling the drugs to make money. The defendant said that he had never received any compensation, financial or otherwise, for assisting with the drug transactions, and he denied that he had taken a rock of cocaine as compensation for the first deal. He later admitted that Island had given him "a couple of dollars to get two 20-ounces up at Hair City." The defendant denied knowing that a gun was in the package he gave Island on June 11. He said that the package was a brown paper bag with tape over it, which he did not open. Although he did not know what was in the bag, he "suspected it might have something to do with some dope." The defendant testified that when he said on one of the tapes that he wanted Island to

help him out sometime, what he meant was that Island should be making some money from the drug deals and when Island got on his feet, he wanted Island to help him out by purchasing beer or cigarettes for him every now and then.

At the conclusion of the proof, the trial court found the defendant guilty of each of the four drug counts. The court found the defendant not guilty of being a felon in possession of a firearm.

The trial court later conducted a sentencing hearing at which it found the defendant to be a Range II offender based on his prior criminal history. The court made findings of specific enhancement and mitigating factors and set the individual sentences at fifteen years each. It then ordered the sentences to be served concurrently with each other but consecutively to an unexpired sentence for which the defendant was on parole at the time of these offenses.

I

The defendant challenges the sufficiency of the evidence for each of his four convictions. He does not, though, point to any particular deficiency. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the trier of fact has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The defendant was convicted of four counts of delivery of a controlled substance. See T.C.A. § 39-17-417(a)(2). "'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship[.]" Id. § 39-17-402(6).

The defendant's guilt of each of the four counts is overwhelming. By his own admission, the defendant took money from Sylvester Island on four occasions and gave Island drugs. In this respect, the defendant testified,

> I feel like I'm guilty with going to get some drugs, but I don't feel like I delivered no drugs to him because he never called me to deliver no drugs for him. He always gave me money to go buy the drugs, which I never delivered no drugs to him.

On June 11, the only occasion on which there was no evidence that the defendant went to a "source" to obtain the drugs for Island, the defendant gave Island a package from Island's son in exchange for $150 that the defendant "suspected might have something to do with some dope." The parties stipulated that the substances in question in three of the counts were cocaine weighing more than

one-half gram. With respect to the other count, the state offered uncontradicted proof that the substance was cocaine weighing one-half gram. The evidence is sufficient to support all four of the defendant's convictions.

II

Next, the defendant challenges the chain-of-custody evidence regarding the drugs involved in the transactions. In determining the admissibility of tangible evidence, it is sufficient if the evidence establishes a reasonable assurance of the identity of the evidence. State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990). Absent a clear mistake or abuse of discretion, the decision of the trial court concerning the sufficiency of evidence as to the chain of custody will not be disturbed. State v. Goodman, 643 S.W.2d 375, 381 (Tenn. Crim. App. 1982); Wade v. State, 529 S.W.2d 739, 742 (Tenn. Crim. App. 1975).

First, we note that the defendant did not object to the admission of the drugs and their identity. Without an objection, the state was not given the opportunity to obviate any claimed shortcomings at the time the evidence was admitted. The defendant first raised the issue in the motion for new trial. Now, on appeal, the defendant attempts to make much of testimony that physical evidence offered at trial was "similar to," "the same as," or "resemble[d]" drug evidence obtained in the course of the defendant's crimes. The defendant also attempts to capitalize on purported conflicts between the testimony of Island, as compared with some of the officers, about who initially took possession of the drugs from Island after the drug deals. Upon review of the record, we cannot say that the trial court abused its discretion in admitting the evidence. The witnesses whose testimony established a foundation for admission of the cocaine identified the evidence with sufficient certainty. The drugs were contained in packaging upon which the officers had placed distinctive markings, such as their initials and the date, and they incorporated these markings into their identification of the evidence. There was some ambiguity in the testimony, particularly that of Island, about which officer received the evidence on some of the occasions. However, the portions of Island's testimony which the defendant says raise questions about the chain of custody of the drugs took place after the evidence in question had already been admitted. At the time the evidence was admitted, the state had established a proper foundation for its admission, and the defendant had not raised an objection. Furthermore, the overall tenor of Island's testimony reflected he was uncertain to whom he had given the drugs on at least some of the dates in question. In contrast, the officers testified about their receipt of the drug evidence, which testimony they corroborated by identifying their initials and markings on the drug packaging.

We acknowledge that an inconsistency exists in the state's evidence regarding the date on which the drugs from the June 11 charge were taken to the TBI laboratory. However, there was also evidence regarding the standard procedures followed by the Drug Task Force and the TBI for maintaining control and security of evidence, and there was no indication other than the date discrepancy that these procedures were not followed. Given this evidence, we cannot say the trial court abused its discretion in allowing the evidence with respect to that count, in particular.

In passing on this issue, we have also considered the defendant's cursory claim in his argument that the evidence "failed to establish with reasonable assurance . . . the identity of the substance alleged to be cocaine . . . ." To the extent that this argument may be interpreted as a challenge to whether the evidence demonstrated that the substance was cocaine, we reject it. The defendant stipulated that the substance relative to three of the four counts was cocaine. Special Agent Dunlap testified that all four of the substances submitted were cocaine.

III

The defendant's final issues pertain to sentencing. He claims he should have received minimum, Range I sentences of eight years, rather than the Range II mid-range, fifteen-year sentences imposed.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d) (2003).[1] As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

> [T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Unless enhancement factors are present, the presumptive sentence to be imposed is the minimum in the range for a Class D felony. T.C.A. § 40-35-210(c) (2003). Our sentencing act provides that, procedurally, the trial court is to increase the sentence within the range based on the

[1] We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the defendant's appeal.

existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Id. § 40-35-210 (2003), Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

In the present case, the record reflects that the trial court considered the evidence, the applicable law, and made the required findings. We afford its sentencing determinations the presumption of correctness.

In conducting our de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2003); see Ashby, 823 S.W.2d at 168; Moss, 727 S.W.2d at 236-37.

We begin with review of the defendant's classification as a Range II offender. The nature of the defendant's challenge in this respect is to the trial court's reliance on the presentence report. The defendant claims that the criminal history contained in a presentence report cannot be used as evidence against an objecting defendant. He relies on an unreported decision of this court, State v. Randolph Scott Jennings, No. E2001-02118-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Dec. 6, 2002), app. filed (Tenn. Apr. 18, 2006), as support for his argument. We disagree with the defendant's interpretation of Jennings. In that case, the defendant claimed that there was no proof of his prior convictions, even though the presentence report was introduced as evidence at the sentencing hearing and was part of the appellate record. Relying on an earlier reported decision, this court said, "[I]nformation in a presentence report is reliable hearsay which may be admitted if the opposing party is offered the opportunity to rebut the same." Id. (citing State v. Baker, 956 S.W.2d 8, 17 (Tenn. Crim. App. 1997) and State v. Richardson, 875 S.W.2d 671, 677 (Tenn. Crim. App. 1993)). We acknowledge that the defendant objected at the sentencing hearing to use of the presentence report as evidence. However, his objection was not based upon any purported inaccuracies in the report but was based upon the competency of the report as proof of prior convictions. In this case, the state offered the presentence report, which contained reliable hearsay based upon the investigation of the officer who prepared it. The defendant had the opportunity to controvert any of the contents of the report, and he chose not to do so at the sentencing hearing. It bears noting that the defendant's trial testimony about his prior convictions was corroborative of portions of the criminal history listed in the presentence report. Also, one of the prior felony judgments against the defendant was received as evidence at the trial. Thus, the trial court properly relied on the presentence report for proof of the defendant's prior convictions.

The question then becomes whether the convictions reflected in the presentence report qualify the defendant as a Range II offender. As pertinent to the defendant, "a [Range II] 'multiple offender' is a defendant who has received . . . [a] minimum of two (2) but not more than four (4)

prior felony convictions within the conviction class, a higher class, or within the next two lower felony classes . . . ." T.C.A. § 40-35-106(a)(1). The present conviction is of a Class B felony. The defendant has a prior conviction of possession of contraband in a penal facility, a Class C felony, two convictions of robbery, a Class C felony, and a conviction of third degree criminal sexual conduct, a Class D felony. See id. §§ 40-35-110, -118. The trial court properly concluded that these offenses qualified him for Range II sentencing.

Next, the defendant complains about the trial court's imposing a fifteen-year sentence for each of his four convictions. As a Range II offender convicted of Class B felonies, the defendant faced sentences of twelve to twenty years for each of his convictions. See id. § 40-35-112(b)(2). In arriving at fifteen-year sentences, the trial court applied three enhancement factors for the defendant's prior criminal history, his being a leader in the offenses, and his being on parole at the time he committed the offenses. See id. § 40-35-114(2), (3), (14)(C) (2003). The defendant offers only general argument that these factors do not apply. Upon review of the record, we are not convinced that the evidence preponderates against the trial court's application of these factors. To the contrary, each is supported by the evidence.

The trial court applied mitigating weight to the defendant's honorable military service and the fact that the offenses did not involve the use or threat of bodily injury. See id. § 40-35-113(1), (13). However, the defendant claims that the trial court erred in failing to apply mitigating weight to his work as a self-employed landscaper and the fact that he had a G.E.D. The defendant did not testify at the sentencing hearing, and the only information about his work as a self-employed landscaper is found in the presentence report. There is no indication that the defendant has a history of stable employment. His criminal record and lack of reported significant employment history indicate the contrary. The defendant obtained his G.E.D. while incarcerated. Our review of the record does not demonstrate that the trial court erred.

The trial court balanced the three enhancement factors with the two mitigating factors and arrived at a fifteen-year sentence. The record supports its determination. Thus, the trial court's sentencing determination was proper.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

_____

JOSEPH M. TIPTON, JUDGE